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No. 88-1835

In The

Supreme Court of the United States

October Term, 1988

THE STATE OF FLORIDA,

Petitioner,

vs.

MARTIN LESLIE WELLS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED (Restated)

WHERE A LAW ENFORCEMENT AGENCY MAINTAINS PROCEDURES TO INVENTORY THE CONTENTS OF IMPOUNDED VEHICLES WHICH DO NOT MANDATE OPENING CLOSED CONTAINERS, IS AN INVENTORY SEARCH OF SUCH A CLOSED CONTAINER CONSISTENT WITH THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED (RESTATED)	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
REASON FOR DENYING THE WRIT	3
THE DECISION OF THE COURT BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL, AND DECISIONS OF APPELLATE COURTS OF OTHER STATES	3
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES	
Colorado v. Bertine, 479 U.S. 367, 197 S.Ct. 738, 43 L.Ed.2d 739 (1978)	*passim*
South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)	*passim*
CONSTITUTIONAL PROVISIONS	
UNITED STATES CONSTITUTION	
Amendment IV	1
Amendment XIV	1

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CONSTITUTIONAL PROVISIONS

Amendment IV, United States Constitution, provides, in part:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . .

Amendment XIV, Section 1, United States Constitution provides, in part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Respondent adopts the facts of the case as stated by the court below.

> While driving a car loaned by a friend, respondent was stopped by the highway patrol for speeding. The trooper noticed the smell of alcohol upon respondent's breath and arrested him for driving under the influence. At this time, respondent agreed to accompany the trooper to the station to take a breathalyzer test.[1] When respondent asked if he could retrieve a coat from the automobile, the trooper agreed, but accompanied respondent to the vehicle. At this point, the trooper saw an amount of cash lying on the car's floorboard. 492 So.2d at 1375-76.
>
> Suspicious of the cash's origin, the trooper asked respondent to open the trunk of the car. Respondent agreed, stating that he did not know what was in the trunk. However, neither respondent nor the trooper were able to manipulate a special locking mechanism that opened the trunk only when the key was pushed in and turned simultaneously. Giving up the effort, the trooper told respondent that the automobile must be impounded and received permission to force the trunk open if necessary and look inside. The trooper did not ask for or receive permission to look in the passenger compartment. *Id.* at 1376.
>
> The car subsequently was transported to a facility under contract with the state, where a search was conducted. During the search, two marijuana cigarette butts were found in an ashtray. The trooper, assisted by others, opened the trunk with the key and found a locked suitcase inside. Under the direction of the trooper, employees of the facility attempted to pry open the suitcase with a knife. Some ten minutes later they succeeded, and found a garbage bag inside containing a large amount of marijuana. *Id.*
>
> Respondent was charged with possession of a controlled substance. After his motion to suppress the contraband was denied at trial, respondent pled nolo contendere, but reserved his right to appeal on the suppression issue. The Fifth District later determined that the trial court had erred, and ordered the contraband suppressed. *Id.* at 1375, 1378. From this order, the state now seeks review.

[1] A test later showed that respondent's blood alcohol content was below the legal limit. Wells v. State, 492 So.2d 1375, 1376 n.1 (Fla. 5th DCA 1986).

REASON FOR DENYING THE WRIT

THE DECISION OF THE COURT BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT, DECISIONS OF THE UNITED STATES COURTS OF APPEAL, AND DECISIONS OF APPELLATE COURTS OF OTHER STATES.

This Court first recognized vehicle inventory searches as a valid exception to the warrant requirement in *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976). *Opperman* permits law enforcement agencies to inventory the contents of impounded vehicles if conducted according to standard police procedures. The Court articulated three situations where government interests outweighed an individual's Fourth Amendment rights: protecting the owner's property in police custody, protecting the police against claims of lost or stolen property, and protecting the police from danger. *Id.* 428 U.S. at 369, 96 S.Ct. at 3097, 49 L.Ed.2d at 1005.

In *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), this Court re-emphasized that inventory searches are consistent with the Fourth Amendment.

Id. 479 U.S. at 372, 107 S.Ct. at 741, 93 L.Ed.2d at 745. The Court held that evidence obtained during inventory searches conducted according to standard police procedures is admissible. *Id.* 479 U.S. at 374, 107 S.Ct. at 742, 93 L.Ed.2d at 747. The Colorado trial court determined that the police department's procedures mandated opening closed containers and listing their contents. *Id.* 479 U.S. at 374 n.6, 107 S.Ct. at 742 n.6, 93 L.Ed.2d at 747 n.6. Since the police discovered the evidence during an inventory search conducted pursuant to standard police procedures, this Court concluded Fourth Amendment standards were satisfied.

The Supreme Court of Florida, citing *Bertine*, correctly invalidated the inventory search of the closed suitcase since the Florida Highway Patrol's standard procedures for inventory searches do not require such action. The court noted that the lack of such a procedure vested the searching officer with impermissible discretion to determine whether or not to open the container. The court emphasized that the record of the instant case revealed no standard procedure regarding closed containers. Thus, the searching officer improperly exercised his discretion by requiring the suitcase be pryed open and violated respondent's Fourth Amendment rights against unreasonable searches.

Petitioner inaccurately interprets *Bertine* to permit an inventory search of unlimited scope provided police procedures are consistent with the government interests espoused in *Opperman*. Petitioner's brief at 17. *Bertine* requires that a standard procedure exists to deal with closed containers and then, only if the procedure is followed is the evidence admissible. *Bertine*, 479 U.S. at 374,

107 S.Ct. at 742, 93 L.Ed.2d at 747. Petitioner's approach would permit searches in such a way as to obviate the warrant requirement. Law enforcement agencies could, after a lawful arrest, impound a vehicle and conduct a search under the guise of inventory procedures in a fashion for which the Fourth Amendment requires a warrant.

Petitioner correctly asserts that the Florida Highway Patrol's standard procedures for inventory searches are consistent with the government interests noted in *Opperman*. Petitioner's brief at 19. However, petitioner, citing the dissent in the court below, insists that only if inventory searches include opening closed containers are the *Opperman* justifications satisfied. Petitioner's brief at 21-22. Petitioner argues that without opening closed containers, law enforcement agencies are subject to claims for lost property and face the unknown dangers of concealed explosives. Petitioner's brief at 22.

These arguments fail the test of reason. Provided closed containers are in police custody until they are returned to the owner, the contents receive maximum protection. The *Opperman* justifications focus on protecting property by securing it in police custody. Law enforcement agencies may leave inventoried articles inside impounded vehicles which are stored in a secured facility. Alternatively, if impounded vehicles are kept in an unsecured area, the *Opperman* justifications warrant removing the property from the vehicle. In either case, the goal is to securely store the property.

Arguably, the likelihood of spurious claims of lost property will be greater if police open closed containers. Especially in the case of locked containers, destroying the

ability to secure personal property by prying open the containers will raise suspicion among property owners. Heightened expectations of privacy motivate the use of such containers. Once the police secure storage for articles discovered during an inventory search, the *Opperman* interests are satisfied. The *Opperman* rationale does not countenance discretionary searches driven by investigatory motives. Further, an undifferentiated fear of explosives is insufficient to justify opening closed containers. If police suspicions are strong enough, procedures authorized by warrant should be undertaken to preserve the individual's Fourth Amendment rights.

The heart of Petitioners' argument focuses on the dissent in the court below. The dissent emphasizes Justice Marshall's dissent in *Bertine:*

> The majority's conclusion that here, unlike *Bertine,* the police operating instructions do not mandate the opening of closed containers is contrary to the facts of *Bertine* as we have them. Neither Chief Justice Rehnquist's opinion for the Court nor Justice Blackmun's concurring opinion actually quotes the police operating instructions which the Court found mandated opening closed containers for inventory. These instructions were, however, quoted by Justice Marshall in dissent where he argued that no standardized criteria limited the police officer's discretion. The operative words are "the Officer shall conduct a detailed vehicle inspection and inventory and record it upon the VEHICLE IMPOUND FORM." *Bertine,* 479 U.S. at 380 n.4. These instructions require a "detailed" inventory but they are certainly no more explicit or definitive than the Patrol instructions quoted above which make the impounding officer responsible for the vehicle, its parts and contents, and require completion of an inventory from listing all articles, such as articles of clothing, equipment,

> and tools. Chief Justice Rehnquist, for the Court, responded to Justice Marshall's criticism by finding that the instructions not only circumscribed the discretion of individual officers, they also protected the vehicle and its contents and minimized claims of property loss. *Bertine,* 479 U.S. at 376 n.7. The standard Patrol instructions here are even more specific than those which the *Bertine* concurring opinion found "mandate(d) the opening of closed containers and the listing of their contents." 479 U.S. at 377 (Blackmun, J., concurring). In my view, *Bertine* stands for the proposition that when a legitimate impoundment is made and standard police instructions mandate that an inventory be conducted, contraband discovered is constitutionally admissible.

In the last sentence, the dissent accurately states the holding in *Bertine.* The dissent erroneously states that this Court held in *Bertine* that the police procedure mandated opening closed containers. The dissent continues by comparing the police procedure in *Bertine* the Florida Highway Patrol's inventory procedure. The opinion asserts that since Florida Highway Patrol's procedures are more specific than those in *Bertine,* and this Court held those to mandate opening closed containers, then the Florida Highway Patrol's procedures must mandate the same approach.

In *Bertine,* this Court never analyzed what the police procedures required. The Court merely emphasized that the Colorado District Court, after reviewing the standard procedures and all other evidence concluded that searching closed containers was mandatory. *Bertine,* 479 U.S. at 374 n.6, 107 S.Ct. at 742 n.6, 93 L.Ed.2d at 747 n.6. The trial court's determination is necessary to conclude that admitting the evidence obtained in *Bertine* is consistent with the Fourth Amendment, but this Court deferred to

the holding of the Colorado District Court. The language of the police procedures may be very similar, but local policies regarding implementation control from state to state. A federal form of government requires this result. Just as similar statutes among the several states may be construed differently, so may be standard police procedures.

The Supreme Court of Florida's holding in the instant case is entirely consistent with the holding in *Bertine*. Since the inventory search exceeded the scope of the Florida Highway Patrol's standard procedure, evidence obtained thereby was inadmissible. The fact that the Colorado police department in *Bertine* and the Florida Highway Patrol have similarly phrased procedures, but different interpretations of inventory search requirements is of no import. These differences result from varying implementations which, under *Bertine*, lead to the opposite conclusion.

Petitioner cites three courts of appeal decisions and two state appellate court decisions asserting the results are inconsistent with *Bertine*. In fact, the decisions reflect the *Bertine* holding accurately, and the seemingly inconsistent results occur due to differing determinations as to what standard police procedures require for inventory searches. Trial courts are particularly well suited to make such determinations. Interrogation of witnesses concerning standard procedures ensures the most accurate assessment of what is truly routine procedure. The language in procedure manuals may not be conclusive, yet agency policy mandates opening closed containers.

Petitioner's argument, logically extended presses for uniform police procedures for inventory searches nationwide. Inherent in constitutional principles is the limited power of the federal government and right of the states to experiment in matters of local concern. Issues of police power and thus inventory search procedures are included in this realm. The key to inventory searches consistent with the Fourth Amendment under *Opperman* and *Bertine* is that searching officers act without discretion. Parties conducting such searches must act within clearly defined bounds and then whatever evidence of criminal conduct is found is admissible.

CONCLUSION

For the reasons stated, this Court should deny to issue a Writ of Certiorari to review the judgment of the court below.

Respectfully Submitted,

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